

WISHA REGIONAL DIRECTIVE

Department of Labor and Industries

Division of Occupational Safety and Health

1.15 DUAL EMPLOYERS & DOSH ENFORCEMENT

Date Issued: July 7, 2006

I. Background

Under the Washington Industrial Safety and Health Act (WISHA), employers are responsible for the safety and health of their employees in the workplace. Employers also sometimes have a responsibility for the safety and health of other employees as a creating, correcting or controlling employer. In applying these responsibilities, the Department of Labor and Industries (L&I) must determine whether the employer of record has failed to reasonably meet his or her obligations under the statute, as well as whether any other involved employers have failed to meet their obligation. Although based on long-standing principles, such “dual employer” analyses have become more frequent in recent years with the growth of temporary services and employee leasing agencies, which provide employees to work at a site under the supervision and control of another employer.

A dual employer situation exists when two or more employers are potentially liable for a violation to which an employee has been exposed. Such situations are distinct from the parallel citations that can be issued to general and upper-tier contractors in construction under the analysis used in the *Stute* decision, which is the subject of separate guidance.

In assessing such situations, L&I must consider the roles of the employer of record (the “primary employer,” who contracts with the employee to perform work in exchange for wages or a salary and issues the employee’s pay check, secures workers’ compensation insurance for the employee, and usually retains hiring and firing authority) and of the on-site employer (the “secondary employer,” who controls the employee at the worksite).

II. Scope and Application

This WISHA Regional Directive (WRD) provides guidance to DOSH enforcement and consultation staff whenever they must assess a situation where two or more employers may share liability for a violation to which an employee has been exposed. It supplements the guidance on “creating, correcting and controlling” employers that is provided in the DOSH Compliance Manual (VII.C.2.b). It supersedes any other previous guidance on the subject, whether formal or informal, and will remain in effect indefinitely. This WRD replaces WRD 1.15, issued December 29, 2000 which it hereby rescinds.

III. Interpretive Guidance

A. What is the primary employer's normal safety and health liability?

The primary employer is required to take all reasonable steps to protect the safety and health of its employees. The primary employer must therefore ensure that:

- Employees are covered by an effective and appropriately tailored Accident Prevention Program (APP);
- Employees receive all general and specific training required to perform work for the secondary employer;
- Employees are provided all Personal Protective Equipment (PPE) required to perform work for the secondary employer.

If the primary employer meets these requirements and does not exercise supervision and control over the employees' work activities at the secondary worksite, then the primary employer will generally not be held liable for violations to which its employees' are exposed at the secondary worksite.

B. Must primary employers provide all PPE and required training themselves?

No. The primary employer can fulfill his or her obligations by taking reasonable steps to ensure that the secondary employer provides the necessary training and/or PPE.

C. Could DOSH cite the primary employer for violations at the secondary worksite?

Yes, the primary employer may be liable for physical violations at the worksite if the primary employer fails to take reasonable steps to assure the above three requirements are met, if the primary employer disregards information about uncontrolled hazards at the worksite, *or* if the primary employer supervises or controls its employees at the secondary worksite (for example, in situations where the primary employer provides a crew, complete with a supervisor, to perform particular activities, or where the primary employer provides specialized staff not subject to the direction of the secondary employer).

D. What is the secondary employer's normal safety and health liability?

The secondary employer is liable for violations at the worksite when supervising or controlling the primary employer's employees at its worksite. The secondary employer may be liable in such situations even if the primary employer is also liable (for example, if neither the primary employer nor the secondary employer took steps to ensure that employees had appropriate respiratory protection to be able to perform their jobs safely).

E. Could DOSH cite both employers for the same violations?

Yes. The primary employer could be cited as described in "B" above *and* the secondary employer can be cited for safety or health violations that exist at its worksite.

F. Are there situations where neither employer would be cited for a documented violation of DOSH?

Except in truly unforeseeable situations or situations involving unpreventable employee misconduct, at least one employer will be liable for any documented DOSH violation that exposes employees to hazards.

IV. Special Consultation and Compliance Protocols

A. *How should DOSH staff determine whether a dual-employer situation exists?*

When violations are documented and employee exposure may involve a dual employer situation, DOSH staff are expected to consider the following:

Does evidence exist that an employer, other than the employer who issues the employees' pay check, was supervising, or was supposed to be supervising the employees' work?

If the answer is *no*, then there is no dual employer issue. If the answer is *yes*, then DOSH staff are expected to apply the guidance in the remainder of this WRD.

B. *How should DOSH staff evaluate the nature of the dual-employer relationship?*

DOSH staff are expected to evaluate the level of secondary employer autonomy by pursuing and documenting answers to the following questions:

- Was the primary employer aware (or should the primary employer clearly have been aware) of the violative condition found at the secondary worksite?
If so, and the primary employer did not take reasonable steps to protect his or her employees from the hazard in question, the primary employer shares responsibility for the violation.
- Did the primary employer control or influence work at the worksite?
If so, the primary employer shares responsibility for the worksite conditions and any violations that result from them (the primary employer who exercises control at the worksite cannot be relieved of safety and health obligations by a contract that assigns the responsibility for those issues to the secondary employer).
- Did the primary employer have authority, by contract, custom, or practice to enter the secondary worksite to supervise the employees' work?
If so, the primary employer may have a greater responsibility to take steps to identify and correct violations on the worksite.
- Did the violation arise because the secondary employer relied on the primary employer for guidance about workplace safety or health?
If so, the primary employer may be responsible for the violations (in such circumstances, the secondary employer may be relieved of responsibility by demonstrating the affirmative "creating employer" defense).
- Did the primary employer take steps to correct or prevent employee exposure to the condition in violation found at the secondary worksite?
If so, then the primary employer may have reasonably fulfilled his or her obligations.

C. *How should citations be handled where the responsibility for a violation appears to be shared between the two employers?*

As a general principle, all employers who knew or should have known about the violation and who had or who controlled employees who were exposed to the violation are liable for WISHA violations and should be cited.

1. Secondary employers are normally liable and should be cited for each violation to which employees (whether their own or others) were exposed on site. In such circumstances, secondary employers will be liable to citation even if it is determined that the primary employer is also liable for the violation.
2. A primary employer cannot be cited for violations at another worksite if DOSH cannot document exposure of the primary employer's employees. This is true even if the primary employer did not ensure its employees would be covered by an effective secondary employer APP, appropriately trained, and provided PPE. In such a case, the primary employer should be messaged about the responsibility to ensure APP coverage, training, and PPE.
3. If employees of the primary employer *have* been exposed to a violation at the secondary site, the decision whether to cite the primary employer will be based on the nature of the violation, the level of involvement the primary employer had with the secondary worksite, and the primary employer's knowledge of the hazard.
 - a. If the analysis in Section IV-B above suggests that there is no significant involvement of the primary employer at the secondary employer's worksite, violations should be cited as follows:
 - APP, Training and PPE Violations

The primary employer shall generally be cited for any failure to comply with APP or any other regulations requiring the provision of PPE or training. However, do not cite if the primary employer was unaware of the violations *and* took 'reasonable action' to ensure that the secondary employer would provide APP coverage and all required training and PPE. Reasonable action is demonstrated by steps that as a whole result in a reasonable degree of certainty that APP coverage, training and PPE will be provided to the employee as required. Reasonable action could include, but is not limited to, the following:

 - Making explicit arrangements in writing with the secondary employer to provide all required APP coverage, PPE, appropriate training, and to keep training current.
 - Establishing a system where employees are not allowed to begin work at a secondary worksite until the primary employer receives a copy of the secondary employer's APP and confirmation that all required training was completed, including a description of the type of training. NOTE: If the primary employer documented an on-site inspection that included reviewing the secondary employer's APP, this is an acceptable substitute for a physical copy of the secondary employer's APP on file.
 - Establishing a system of periodically monitoring the secondary employer to ensure compliance with agreements about employee safety.
 - Informing employees about the types of training that must be received before beginning work at the secondary site and instructing employees to contact the primary employer immediately if the secondary employer requests that work begin before the training is received, or if employees feel that the work is unsafe.
 - Other Violations

If the primary employer will be cited for failing to provide or take reasonable steps to provide effective APP coverage, appropriate training, or PPE, the primary employer may also be cited for other types of violations identified at the secondary worksite. In such cases, staff are expected to cite the primary employer if its employees were exposed to those violations and those violations directly relate to the deficiencies for which the primary employer is liable.

Example: An employee was not trained for respirator use, but was fully trained for forklift operation. The primary employer may be cited for violations related to respirator use, but not for violations related to use of a forklift (except as provided below).

- b. In addition to the situations described in IV-C.3.a, the primary employer can be cited if he or she had knowledge (or clearly should have had knowledge) of the violation. However, the primary employer should not be cited if all of the following conditions are present:
 - The primary employer took reasonable steps to abate the violation, including giving the secondary employer a reasonably short deadline reflecting the severity of the hazard (and the deadline had not yet passed without further action when the violation was identified by DOSH).
 - The primary employer was not able to bring about immediate abatement because of a lack of direct control over the site.
 - The hazard was not an imminent danger situation (imminent danger would leave the primary employer with no option but to prohibit the employee from going to work at the secondary site until the imminent danger has been corrected).
- c. In addition to the situations described in IV-C.3.a and IV-C.3.b, the primary employer may be cited if he or she is able to exercise control over the worksite, had authority to enter the site to supervise employees' work, or gave deficient advice or guidance related to employee health and safety issues.

D. Who can staff consult about dual employer issues?

Regional staff that are dealing with complex issues involving dual employers are encouraged to contact the Compliance Operations Manager for assistance.

Approved: _____
 Stephen M. Cant, CIH, Assistant Director
 Department of Labor and Industries
 Division of Occupational Safety and Health

For further information about this or other WISHA Regional Directives, you may contact DOSH Compliance Operations at P.O. Box 44650, Olympia, WA 98504-4650 – or by telephone at (360) 902-5460. You also may review policy information on the DOSH website (<http://www.lni.wa.gov/Safety/>).